FILE COPY

No. 173

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

UNITED STATES OF AMERICA, EX REL. MORRIS L. MARCUS, AND MORRIS L. MARCUS IN HIS OWN BEHALF,

Petitioners,

v.

WILLIAM F. HESS ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

HOMER CUMMINGS,
CHARLES J. MARGIOTTI,
Counsel for Petitioners.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

Your petitioners, the United States of America ex rel. Morris L. Marcus and Morris L. Marcus in his own behalf, respectfully pray that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Third Circuit, entered in the above cause on March 23, 1942, reversing the judgment of the United States District Court for the Western District of Pennsylvania.

Opinions Below.

The opinion of the district court denying motions for new trial and judgment n.o.v. (R. 346) is reported in 41 F. Supp. 197. The opinion of the circuit court of appeals (R. 471) is reported in 127 F. 2d 233.

Jurisdiction.

The judgment of the circuit court of appeals sought to be reviewed was entered on March 23, 1942 (R. 485). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented.

Respondents, through admittedly collusive bidding, secured contracts to perform work on municipally sponsored PWA projects. Their contracts, work, and claims were supervised and approved by Federal officers. They were paid, through the municipalities, with funds obtained from the Public Works Administration. The broad question here is whether respondents are liable to the United States for double damages and penalties on account of their fraud, under one or more of the first three clauses of R. S., sec. 5438. A question is therefore presented under each clause as follows:

1. *Liability under first clause of statute.*—Whether, in a suit on behalf of the United States for damages and penalties, an admittedly fraudulent contractor's claim approved by a Federal officer and paid out of United States (PWA) funds is not actionable under the first clause of R. S., sec. 5438, as a "claim upon or against the Government of the United States, or any department or officer thereof"?

2. *Liability under second clause.*—Whether the making and presentation by a defendant contractor of fraudulent

claims and false certificates of non-collusive bidding, used by a municipality to aid it in obtaining payment of a grant to such municipality of United States (PWA) funds for the purpose of paying such contractor's claims, is not actionable as against such contractor under the second clause of R. S., sec. 5438, which imposes liability upon "every person * * * who * * * makes, uses, or causes to be * * * used, any false * * * claim [or] certificate" for the purpose "of obtaining or aiding to obtain the payment or approval of" a claim against the United States;

3. *Liability under third clause.*—Whether the presentation of fraudulent contractors' claims addressed to the municipal sponsor of a PWA project for payment from federal PWA funds in the hands of such sponsor—all in furtherance of a conspiracy to defraud the United States—is not actionable under the third clause of R. S., 5438, which imposes liability upon any person who enters into "any agreement, combination, or conspiracy to defraud the Government of the United States" by obtaining the allowance of "any claim," whether against the United States or against a third party, where the effect is to defraud the United States.

Statutes Involved.

Revised Statutes, sec. 5438:

> Every person [1] who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or [2] who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll,

account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or [3] who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim * * * shall be imprisoned at hard labor for not less than one or more than five years, or fined not less than one thousand nor more than five thousand dollars.

Revised Statutes, sec. 3490:

> Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall do or commit any of the acts prohibited by any of the provisions of section fifty-four hundred and thirty-eight, Title "CRIMES," shall forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit.[1]

Revised Statutes, sec. 3491 and 3493, authorizing *qui tam* proceedings to enforce the liability imposed by R. S., sec. 3490, are printed in the Appendix.

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[1] Because R. S., sec. 3490, imposed the liability enforceable in *qui tam* proceedings under R. S., sec. 3491, only for acts in violation of the prohibitions contained in R. S., sec. 5438, at the time of the enactment of R. S., sec. 3490, and its incorporation of R. S., sec. 5438, in 1874, the conduct and acts giving rise to a cause of action under R. S., sec. 3490, must be measured by the language of R. S., sec. 5438, as it originally read at the date of the enactment of R. S., sec. 3490, and not as later amended. *Olson* v. *Mellon*, 4 F. Supp. 947, aff'd 71 F. 2d 1021, cert. denied 293 U. S. 615.

While R. S., sec. 5438, was later amended (see 18 U. S. C. secs. 80, 83) the scope of R. S., sec. 3490, which incorporated it in the year 1874 remains intact and unaffected. *Kendall* v. *United States*, 12 Pet. 524, 625; *In re Heath*, 144 U. S. 92, 93, 94.

Regulations under the PWA statutes also appear in the Appendix.

Statement.

On January 25, 1940, the petitioner on behalf of the United States and as well in his own behalf brought this action in the Western District of Pennsylvania against 52 defendants to recover the penalties and double damages, provided by R. S., sec. 3490, resulting from acts in furtherance of a conspiracy by defendants to defraud the United States in violation of R. S., sec. 5438.

The complaint charged that grants of money were made by the United States, through the Public Works Administration, to aid in the construction of numerous projects by municipalities and school districts (referred to as "sponsors") in and about the City of Pittsburgh (R. 10); that such sponsors advertised for bids for contracts for the performance of the electrical work involved in such projects (R. 10-11); and that the defendants, all members of the Electrical Contractors Association of Pittsburgh, Inc., thereupon conspired to defraud the United States (R. 11). It alleged that, in furtherance of, and pursuant to, the conspiracy, they engaged in sham and collusive bidding, falsely and fraudulently submitted bids, received awards and entered into contracts, submitted false and fraudulent claims for payment thereof, made false and fraudulent statements, and made false and fraudulent certificates knowing them to contain fraudulent or fictitious statements or entries (R. 14). The answer of defendants denied substantially all the allegations of the complaint (R. 33, 34, 35).

After a lengthy trial, the jury returned a verdict against all the defendants save one in the sum of $315,100.91, being $203,100.91 damages and $112,000 penalties (R. 338). Judgment was entered accordingly (R. 389). On motion for new trial (R. 341-346) the court entered an opinion and order

overruling the motion (R. 346, 387). The circuit court of appeals, however, held that the statute authorizes recovery only when the defendants present a direct "claim upon or against the government of the United States or any department or officer thereof" (R. 475), and that the evidence failed to show that the defendants had made or presented such a claim (R. 479). It entered judgment of reversal accordingly (R. 485).

The Facts.—As to each of the projects here involved, with unimportant variations, the evidence showed that the sponsor—that is, the municipality or school district—made application to the Federal Emergency Administration of Public Works for a grant (R. 82, 537; 44 C. F. R. 216.2-216.3[2]). An estimate of cost of the project, detailed according to each branch of the work, viz. general construction, heating, plumbing and electrical, was submitted on PWA Form 231 (R. 498). The grant was in each case made on what PWA approved as the proper estimate of the cost of the project (R. 498-499, 500). The Public Works Administration addressed a formal offer to the sponsor incorporating the standard terms and conditions of PWA Form 230 (R. 157-179) by reference (R. 179-180; 497-498), and the latter by its acceptance created the Finance Agreement between the Government and the municipality (R. 116-117, 181-184; 44 C. F. R. 222.1).

The grant or agreement of the Public Works Administration was to pay 45% of the actual cost of the project but

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[2] The President, under the authority of Section 201(a) of the National Industrial Recovery Act of June 16, 1933, 48 Stat. 200, delegated to the Federal Emergency Administrator of Public Works authority to prescribe rules and regulations (Executive Orders Nos. 6252, August 19, 1933, and 6929, December 26, 1934, 44 C. F. R. 201.1, 201.2 and 201.4). The regulations are collected in Title 44, Ch. II, of the Code of Federal Regulations. Those which are particularly pertinent are reprinted in the Appendix *infra*.

not in excess of a specified sum representing 45% of the estimated cost (R. 45, 88-89, 179).[3] The contract provided that a separate account, referred to as the "Construction Account," should be set up in a bank; that all grant payments by the United States, the sponsor's funds, and any other moneys required to pay the cost of the project were required to be deposited promptly in the Construction Account; and that: "Payments for the construction of the Project will be made only from the Construction Account. • • • Moneys in the Construction Account will be expended only for such purposes as shall have been previously specified in a signed certificate of purposes filed with and accepted by the Government" (R. 163; cf. 44 C. F. R. 222.20, 222.21).

After execution of the Finance Agreement between the Public Works Administration and the local municipality, the latter advertised for bids on the work (R. 43-44, 217). Each advertisement disclosed that the work was a Public Works Administration project (R. 43-44, 217). Attached to the successful bids of the defendant-contractors on all projects involved herein, with the exception of the Pittsburgh Municipal Airport Project, were signed statements or certificates of non-collusive bidding (R. 225-226). The contract documents, which included the certificates of non-collusive bidding (R. 217, 225-226), were required to be, and were, submitted to PWA officers for approval (PWA Form 230, R. 165, 217, 495, 502).

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[3] Of the 47 projects as to which the plaintiff claimed damages at the close of the trial, only two involved 30% limitation of the federal grant (R. 331). The Act of June 16, 1933, c. 90, Tit. II, Sec. 203 (a), 48 Stat. 195, 202, provided that "no such grant shall be in excess of 30 percentum of the cost of the labor and materials employed upon such project." The Work Relief and Public Works Appropriation Act of 1938, Joint Resolution of June 21, 1938, c. 554, Sec. 201(d), 52 Stat. 809, 816, provided that "no grant shall be made in excess of 45 percentum of the cost of any non-Federal project."

Collusion in bidding.—As stated in the opinion of the circuit court of appeals (R. 472):

> The appellants, the officers and members of the Electrical Contractors Association of Pittsburgh, conspired to rig the bidding on these projects. The pattern of the collusion was the informal and private averaging of the prospective bid which might have been submitted by each appellant. An appellant chosen by the others would then submit a bid for the averaged amount and the others all submitted higher estimates. The government was thereby defrauded in that it was compelled to contribute more for the electric work on the projects than it would have been required to pay had there been free competition in the open market.

Thus both courts below recognized the collusion in bidding and the consequent fraud upon the United States.

Claims by the contractors.—As the work progressed, the defendant contractors were obliged to submit "Periodical Estimates for Partial Payment", PWA Form I-23 (R. 190, 202), for approval by the PWA Resident Engineer Inspector in order to obtain partial payment for the work performed during the preceding calendar month.[4] Such estimates, and their approval by the PWA representative, were required by the Regulations (44 C. F. R. 237.8, 237.13), by the Finance Agreement of the sponsor with the Government (PWA Form 230, R. 174, 175-176), and by the terms of each contract (R. 119, 232, 234, 48, 59, 61-62, 64, 66, 112, 521, 536). Thereafter, the estimate was turned over to the sponsor for payment from the Construction Account (R. 41, 48, 64).

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[4] It may be noted that this PWA Form I-23, used for all claims submitted by the contractors, called special attention to the fact that claims against the United States were involved, by citing federal statutes punishing presentation of false claims against the United States (R. 190, 191, 202, 204).

Requisitions by the municipalities.—Pursuant to the Regulations (44 C. F. R. 230.21-230.25), the Finance Agreement between the United States and the municipality provided that the government would pay for deposit in a specially established Construction Account 15% of the previously estimated cost on advance requisition by the sponsor after acceptance of the Government's offer, 10% upon a first intermediate requisition when the sponsor had deposited its share in the same account, 10% upon a second intermediate requisition submissible when the project was 50% completed, and 10% upon final requisition after completion of the project and final audit, but not in excess of 45% of the actual cost of the project "as determined by the Administrator" (PWA Form 230, R. 157, 160-162).

The requisitions or claims of the municipalities were required to be supported by the claims of the contractors, as "documents necessary to support such requisitions" (R. 162, 163). The terms and conditions of the Finance Agreement provided that the sponsor would require of the contractor and submit to the PWA representative, on forms supplied by the Government, "Periodical Estimates for Partial Payment" (R. 174). These periodical estimates were the PWA Form I-23 above referred to, upon which the contractor in each instance made his monthly claim for payment (R. 202-207). When grant requisitions upon the United States were made by the sponsor, these monthly estimates were part of, and included in, the records audited by the PWA in determining how much of the sponsor's requisition or claim against the United States was to be paid (R. 505-507, 528).[5]

[5] PWA auditors examined and audited the accounts and all costs pertaining to each project before each disbursement of moneys by the PWA under the grant, in order to determine items of cost proper to be included in computing the amount of the grant earned by the sponsor under its Finance Agreement (R. 53, 107, 522, 528, 529; 44 C. F. R. 202.22, 230.1, 230.2). And the regulations specified that, in reviewing the sponsor's

Decision of the district court.—In its opinion overruling the motion for new trial, the trial court pointed out that there was in each case evidence as to two types of payments, each based on a particular type of claim, showing: (1) That the granted money was initially paid out of the United States Treasury to be deposited in the joint Construction Account only upon allowance of requisitions by the municipalities based on the estimates submitted by the contractors to the sponsor and by it in turn submitted as supporting documents for its requisition on the Public Works Administration; (2) That no payments could be made by the sponsor from federal funds in the Construction Account to the contractor without approval by the local PWA representative of the estimates submitted monthly by the contractor. The court said (R. 349):

> The money the Government agreed to contribute to these projects was paid out in the course of the carrying-out of these projects only on sworn estimates submitted by the contractor to the Administrator, and approved by him on Federal Form (I-23). The Federal funds allotted to each project were placed in a bank approved by the Administrator, which bank account contained also the funds of the local authority. This special fund was from time to time checked by a representative of the Administrator; and no payments could be made therefrom to the contractor doing the work, except with the approval of the Administrator, which approval was noted on Form I-23 above mentioned.

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requisition, the Regional Director should "compare the financial entries on the requisition with the project audit made by the division of accounts" (44 C. F. R. 230.24).

That the certificate of non-collusive bidding in the defendant's bid was a material part of the documents considered in passing on the question of payment by the United States under the grant in each case is shown by the reconciliation sheet included in the part of the record brought here, for it shows a suspension of the claim of the City of Pittsburgh based on the contract of one of the defendants because of the alleged collusive bidding (R. 211, 215, 533).

Decision of the circuit court of appeals.—The circuit court of appeals, although it recognized that "the government was • • • defrauded in that it was compelled to contribute more for the electric work on the projects than it would have been required to pay had there been free competition" (R. 472), reversed on the ground that (R. 475, 479):

> The statutory language here important authorizes recovery only where the defendants presented a "claim upon or against the government of the United States or any department or officer thereof." • • •
>
> The claims of the defendants • • • were simply against the local municipalities. Since the defendants had no claim upon or against the United States, this action was not authorized by the informer statutes.

Specification of Errors To Be Urged.

The circuit court of appeals erred:

1. In holding that a right of recovery was not established under the first clause of R. S., sec. 5438, which makes liable "every person who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent."

2. In holding that the only statutory language important in the case is that of the first clause of R. S., sec. 5438.

3. In failing to hold that a right of recovery was established under the second clause of R. S., sec. 5438, which makes liable "every person • • • who, for the purpose of obtaining or aiding to obtain the payment or approval of [any claim upon or against the Government of the

United States] makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry."

4. In failing to hold that a right of recovery was established under the third clause of R. S., sec. 5438, which makes liable "every person • • • who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim."

5. In reversing the judgment of the district court.

Reasons For Granting the Writ.

The circuit court of appeals, in holding the statute to be too narrow to encompass the admitted fraud and injury in the common situation here presented, has severely limited and in large degree emasculated a statute addressed to the cure of a persistent and recurring evil at a time when opportunity and occasion for its violation is increasing. The fact that this is a *qui tam* suit is irrelevant since the rights of the United States suing in its own name under the same statute, R. S., sec. 3490, could ascend to no greater dignity. The decision, therefore, vitiates the only existing Congressional enactment adequate to make the United States whole on account of frauds depriving it of money or property.

Revised Statutes, sec. 5438, standing alone is merely a criminal statute. But R. S., sec. 3490, incorporates it and creates in the United States a right to recover double the amount of damages for pecuniary or property loss suffered by reason of fraud in violation of R. S., sec. 5438, together with a civil penalty of $2,000 for each such violation. Originally adopted in 1863 when frauds against the Government

were prevalent in connection with Civil War contracts, one of its objectives obviously was to reimburse the Government for the heavy expense of investigation as well as for the loss directly resulting from the fraud.[6] Cf. *Stockwell* v. *United States*, 13 Wall. 531, 547, 551; *Helvering* v. *Mitchell*, 303 U. S. 391, 401. No other federal statute thus adequately protects the United States by permitting recovery of double damages. Hence, the suggestion of the circuit court of appeals that the United States or the municipality in each case may bring suit for simple damage on account of fraud and be made "completely whole" (R. 479) ignores Congressional policy, deprives the United States of a right of recovery sufficient to include the expense of investigation and litigation, abolishes a civil penalty, and nullifies the very purpose of the statute.

The portions of R. S., sec. 5438, here relevant are the first three clauses proscribing three distinct offenses with reference, respectively, to "every person"—

> [1] who makes or causes to be made or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or
>
> [2] who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or

[6] Revised Statutes, sec. 5438, was derived from the Act of March 2, 1863, c. 67, secs. 1 and 3, 12 Stat. 696, 698; and R. S., sec. 3490, was derived from section 3 of the same act. In the respects here pertinent they are substantially identical with the language of their percursor. R. S., sec. 3490 is now inaccurately codified as 31 U. S. C. sec. 231.

> [3] who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim.

But the circuit court of appeals ignored the second and third clauses of the statute altogether, and treated the statute as though it consisted solely of the first clause, saying (R. 475):

> The statutory language herein important authorizes recovery only where the defendants presented a "claim upon or against the government of the United States or officer thereof."

By narrow and erroneous construction of this language of the first clause it held that no acts in violation of that clause had been established. In thus narrowly construing the first clause, and in thus entirely disregarding the second and third clauses, the court below has defeated the plain intention of Congress.

1.

The narrow construction of the first clause of R. S., sec. 5438 is not warranted by the terms of the statute and is in conflict with decisions of the circuit courts of appeals for other circuits.—That the claim of the contractor in each instance was a claim against the United States is established by the evidence. As shown in the statement of facts above, the grant in each case was made by the United States only upon what PWA approved as the proper estimate of the cost of the project (R. 498-499, 500). The plans and specifications, prepared by the sponsors through their architects and engineers, were required to be and were submitted to PWA for approval (R. 530, 535-536, 537-538). The sponsor in advertising for bids plainly stated that a PWA project was involved (R. 217, 225). The grant payments

by PWA were placed in a special, ear-marked Construction Account together with funds of the sponsors, and were subject to use solely for the construction of the particular project under the terms and conditions of the contract between PWA and the sponsor (R. 55-56, 61-62, 64, 89, 97, 99-100, 107, 509, 525). All plans and specifications, contract documents, performance of work, construction accounts, payrolls, and payments of money were supervised, regulated, and approved by PWA (R. 51, 74, 79, 80, 86, 111, 495, 502, 503, 529, 531, 535-536, 537-538).[7]

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[7] In addition to the record here, the nature of the transaction has been set forth by the Secretary of the Treasury in an elaborate report—pursuant to Sen. Res. No. 150, 76th Cong., 1st Sess., 84 Cong. Rec. 7954-7955, respecting the financial operations of federal lending and spending agencies—of which the following excerpts are here pertinent (Sen. Doc. No. 172, 76th Cong., 3d Sess., v. 26, pt. 1, February 15, 1940):

"Disbursement of funds is made by the Public Works Administration only after approval of a certificate of purposes setting forth the proposed use of the funds." (P. 274.) "A properly certified voucher is issued for each disbursement, after the project costs have been audited at the site of such project and such costs found to be in accord with the terms of the contractual arrangement. • • • The determination of loan and grant payments • • • requires that the Government have complete knowledge of all costs incurred for each project. • • • The scope of the audits includes an examination of all basic records supporting costs incurred in connection with each project • • • Among the important features covered by these audits are the determination of whether or not loan and grant funds are being expended in accordance with previously approved estimates, whether there has been compliance with Public Works Administration terms, conditions, and requirements, and the identification of any expenditures which may have been improperly made from the project funds or which may not be eligible for participation in the grant." (P. 275.) "All disbursements, other than administrative expense, are based upon contractual arrangements which have been checked and approved. The vouchers are thoroughly checked to ascertain if payments are correct, and the amount paid is dependent upon the result of an audit made at the site of the work and specific clearance by all interested divisions of the Public Works Administration. Only after that is it certified to the disbursing officer for payment." (P. 276.)

Each claim by a contractor was made on PWA Form I-23 headed "Federal Emergency Administration of Public Works", entitled "Periodical Estimate for Partial Payment", and including a printed statement that—

> The project to which the contract herein referred to relates is a non-Federal project the construction of which the United States of America, through the Federal Emergency Administration of Public Works, is aiding the owner in financing (R. 190, 191).

Each was submitted to a federal officer for approval before payment. Thus the situation falls precisely within the plain language of the first clause of R. S., sec. 5438, imposing liability on "every person who * * * presents or causes to be presented, for payment or approval, to or by any person or officer in the civil * * * service of the United States any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent."

The moneys representing that portion of the Federal grant paid out of the Treasury to the local municipalities on requisition and deposited in the special Construction Account were earmarked as moneys of the United States, and the account was supervised in every detail by federal officers. In *Madden* v. *United States*, 80 F. 2d 672 (C. C. A. 1), cert. denied 297 U. S. 710, the court said (p. 676):

> Defendant contends that there was a fatal variance between the proof and the indictment. His argument is that funds granted by the Federal Emergency Relief Administration to the Emergency Finance Board, a state agency, became state funds and thereafter no title thereto existed in any federal agency and when the Emergency Finance Board transferred part of its funds to the City of Boston for payment of Boston Public Library employees, title to such funds passed to the City of Boston, and thereafter the power of disposition of such funds was in the City of Boston and

no Federal agency had any power over them. This contention is not sound. All projects carried on with money derived from the federal government had to be approved by the Federal Administrator. Any diversion of such funds from the project to which they were assigned was a diversion of government money. As hereinbefore stated, all funds allotted by the Federal government for the relief of unemployment even though disbursed by state agencies were earmarked as federal funds, and if diverted from the use for which they were granted it constituted a fraud upon the government.

In *Langer* v. *United States*, 76 F. 2d 817 (C. C. A. 8), the court said (p. 823):

> Appellants next contend that the indictment charges no offense because if the money were money of the United States prior to its being turned over to North Dakota officials, it then ceased to be such, and appellants could not obstruct nor defeat the administration of the federal statutes because they were administering funds belonging to the state, and were not federal officials. In this connection it is urged that it was the intent to pass full and complete title to the money when the Reconstruction Finance Corporation, or the Administrator under the Federal Emergency Relief Act of 1933, loaned it to the state, or otherwise devoted it to the use of the state. Whether the money is granted or loaned by the Reconstruction Finance Corporation or the Administrator under the Federal Relief Act of 1933, it is money of the Reconstruction Finance Corporation.

See to the same effect *United States* v. *Harding*, 65 App. D. C. 161, 81 F. 2d 563, 568. The holding of the court below presents a conflict with these decisions. Moreover, whatever may have been the arrangement in those decisions, in the present case the facts disclose clearly that the United States did not relinquish control of the funds.

The moneys initially came from the Federal Treasury and could not rightfully be disbursed to the contractors on their Form I-23 monthly periodical estimates until approval thereof by the local PWA resident engineer inspector (R. 41, 48, 56-57, 59, 61-62, 66, 119, 521, 536; Ex. 107, R. 185, 190, 193-194; Ex. 245, R. 202, 207). In submitting its monthly claim for allowance by the PWA resident engineer inspector, therefore, the defendant contractor in each instance knew that it was by this action inducing the last step necessary to complete the relinquishment by the United States of its control over its moneys on deposit in the Construction Account. This is all that any claim against the United States can do.

It is not necessary that the claim be formally addressed to the United States. A claim is just as clearly a claim against the United States when submitted for approval to an officer of the United States, so long as it involves a claim against, or in derogation of, the pecuniary or property right of the United States. See *United States* v. *Mercur Corporation*, 83 F. 2d 178, cert. denied 299 U. S. 576. The first clause of the statute here involved, moreover, in terms includes the presentation of such claims "for payment or approval, to or by any person or officer in the civil • • • service of the United States."

Finally, in its construction of the first clause of the statute, to which it arbitrarily limited its attention, the court below ignored further important and controlling language. Even if it be assumed that these were technically claims against the municipalities rather than against the United States, still the presentation of the contractors' claims to the municipalities, in the words of the first clause of the statute, "causes to be presented" in turn a claim by the municipalities "against the Government of the United States" which the contractors knew "to be false or fraudulent". The facts supporting the cause of action under this

portion of the first clause are more fully set forth below in connection with the next point.

2.

The circuit court of appeals ignored the second clause of R. S., sec. 5438, and thus both nullified the clearly expressed intention of Congress and deprived the United States of substantial rights under the statute.—The provisions of R. S., sec. 5438, evince an intention on the part of Congress to protect the United States against pecuniary loss by fraud, no matter how indirect the cause. The first clause relates to the presentation of a "claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious or fraudulent". The second clause relates to anyone who, for the purpose of "*aiding to obtain*" the payment or approval of a claim against the United States or any department or officer thereof, "makes, uses or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit or deposition, knowing the same to contain any fraudulent or fictitious statement or entry."

Thus, plainly in this second clause Congress intended to reach not the direct presentation of a fraudulent claim against the United States covered by the first clause, but rather a separate and distinct offense: The making or causing to be used of a false claim, certificate, or affidavit—whether or not in itself it be a "claim against the United States"—if such claim, certificate, or affidavit be "for the purpose of obtaining or *aiding to obtain* the payment or approval of a claim against the United States" by another—in this case the municipality. *United States* v. *Coggin*, 3 Fed. 492, 495; see *United States* v. *Strobach*, 48 Fed. 902, 909.

Acts by defendants in violation of the second clause of R. S., sec. 5438, were clearly established. The evidence

showed that, in furtherance of the conspiracy, claims and certificates were made to the municipalities and thus caused to be used in turn by the municipalities in aid and support of the latter's claims against the United States for payment under the federal grants. The evidence further showed that they were included in the Government audit and relied upon by the administrative officers of the Government in acting upon the municipalities' requisitions of federal funds to be placed in the Construction Account. Thus, these false "claims" and false "certificates" were made by them and caused by them to be used within the meaning of the second clause "for the purpose of obtaining or aiding to obtain the payment or approval of" claims upon the Government of the United States by the municipality in each case. The municipalities, of course, were but the innocent conduits of the fraud of the defendants.

The evidence established that the defendants' contracts were based on fraudulent bidding and that included in the bids was a certificate by the bidder that

> this Proposal is genuine and not sham or collusive, or made in the interest or in behalf of any person, firm or corporation not herein named, and that the undersigned has not directly or indirectly, induced or solicited any other bidder to submit a sham bid, or any other person, firm, or corporation to refrain from bidding and that the undersigned has not in any manner sought by collusion to secure for himself an advantage over any other bidder. (R. 226.)

The successful bid, including the false certificate, was made part of the contract (R. 217-276, 226). Each contract, including the false certificate of the bidder, was submitted to, and initially approved by, the Regional Director for PWA (R. 217).

As shown above, the contractor in each case also submitted "claims" for payment on monthly "Periodical Estimates for Partial Payment, PWA Form I-23".

The municipality then—upon the contractors' certificates and claims—in each case made requisitions upon the United States for moneys to be deposited in the Construction Account (R. 160-162). There surely can be no denial that these requisitions were claims against the United States. And it is equally clear that these requisitions were, within the meaning of the statute, aided by the "certificates" and "claims" (Form I-23) of the contractors. The requisitions were, it may be repeated, based on work done in part by the defendant contractor on each project. In determining what portion of the amount claimed in the requisition of the municipality should be paid, auditors for the PWA audited the accounts of the municipality pertaining to the project and, in so doing, reviewed and took into account the contractors' fraudulent Form 1-23 monthly estimates or claims for payment as part of the basis of the claim of the municipality against the United States (44 C.F.R. 202.22; R. 53, 107, 504, 505-506, 507, 522, 528, 529). The audit in each case showed the monthly estimates of the contractors (R. 53) and, under the regulations, was also used by the Regional Director in passing on the financial entries in the requisition of the sponsoring municipality (44 C.F.R. 230.24). By the same regulation it was provided that the Executive Officer in Washington in making a final review was to make a check against "all pertinent project records", which obviously would include in each case the original contract with its false certificate of non-collusive bidding.[8]

[8] These were duly published regulations as to which defendants are charged with knowledge, since they have the force of law. *United States v. Grimaud*, 220 U. S. 506, 517-521; *Hampton & Co. v. United States*, 276 U. S. 394, 409.

It is thus clear that the contractors' false certificates and fraudulent Form I-23 claims had the effect, and were "for the purpose of * * * aiding to obtain the payment or approval" of the requisitions of the municipalities upon the United States. The defendant contractors, in the language of the statute, made and "caused [these false certificates and claims] to be used" by the municipalities against the United States. For it is axiomatic that the conspirator defendants are presumed to intend the ordinary, natural, probable, or necessary consequence of their voluntary, intentional, and deliberate acts. *United States* v. *Patten*, 226 U. S. 525, 543; *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, 243. Accordingly, the evidence clearly brought the defendants within the language of the second clause of R. S., sec. 5438, imposing liability upon any one "who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim [against the United States] makes, uses or causes to be made or used, any bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition knowing the same to contain any fraudulent or fictitious statement or entry."

But the circuit court of appeals failed even to consider whether a cause of action had been established under this plainly pertinent language of the second clause of R. S., sec. 5438. In so doing, the court violated the well-established rule that effect must be given to all parts of a statute. *D. Ginsberg & Sons* v. *Popkin*, 285 U. S. 204, 208; *McDonald* v. *Thompson*, 305 U. S. 263, 266.

3.

The court below ignored the third clause of R. S., sec. 5438, which imposes civil liability upon any person who enters into "any agreement, combination, or conspiracy to defraud the Government of the United States" and pursuant

thereto presents "any false or fraudulent claim" whether against the United States or against a third party so long as the effect, as here, is to defraud the United States.—The third clause of R. S., sec. 5438, evinces still further Congressional intention to assure that the statute would embrace every possible type of fraud in connection with claims paid in whole or part from Federal funds. It was obviously intended to apply where claims in effectuation of the conspiracy are made, whether directly against the United States or against third parties, if the result is to defraud the United States. For, unlike, and in sharp contrast with, the language of the first and second clauses, the word "claim" in the third clause is not limited to those "against the United States." The third clause by its terms embraces "any false or fraudulent claim." Since Congress elected to frame three separate clauses, the difference in phraseology in the third clause cannot be disregarded.

Here the conspiracy, in the form of collusive bidding, is shown, admitted, and expressly found by both courts below. The third clause of R. S., sec. 5438, is directed at any form of joint action "to defraud the Government of the United States." Even the court below acknowledges that, by the acts of the defendants, "the government was • • • defrauded in that it was compelled to contribute more for electrical work on the projects than it would have been required to pay had there been free competition" (R. 472).

This tangible and pecuniary fraud upon the United States consummated by claims—whether regarded as falling within the first, second, or third clauses of R. S., sec. 5438—is plainly within the scope of the statute. It is a travesty to assume, as does the court below, that Congress intended to protect against claims presented to federal departments at Washington but not against claims presented to a federal officer or the sponsor of a PWA project at

Pittsburgh, where a fraud involving federal funds results in either instance.

Importance of the Question.

The question here is whether the plain language of the statute is to be judicially limited and in large part nullified. No other legislation confers the right to recover penalties and double damages for frauds in connection with claims against the United States. The pressing need for such a remedy for this specific evil has been recently recognized in this Court. See *United States* v. *Cooper Corp.*, 312 U. S. 600, 614. Judicial recognition of the plain intent of Congress and the preservation of the remedies and safeguards created by it require that the decision of the court below be brought here for review.

Wherefore it is respectfully submitted that this petition for certiorari should be granted.

HOMER CUMMINGS,
CHARLES J. MARGIOTTI,
Counsel for Petitioner.

June, 1942.

APPENDIX.

Revised Statutes.

Sec. 3491. The several district courts of the United States * * * within whose jurisdictional limits the person doing or committing such act shall be found, shall, wheresoever such act may have been done, or committed, have full power and jurisdiction to hear, try, and determine such suit. Such suit may be brought and carried on by any person, as well for himself as for the United States; the same shall be at the sole cost and charge of such person, and shall be in the name of the United States, but shall not be withdrawn or discontinued without the consent, in writing, of the judge of the court and the district attorney, first filed in the case, setting forth their reasons for such consent.

Sec. 3493. The person bringing said suit and prosecuting it to final judgment shall be entitled to receive one-half the amount of such forfeiture, as well as one-half the amount of the damages he shall recover and collect; and the other half thereof shall belong to and be paid over to the United States; and such person shall be entitled to receive to his own use all costs the court may award against the defendant, to be allowed and taxed according to any provision of law or rule of court in force, or that shall be in force in suits between private parties in said court: *Provided*, That such person shall be liable for all costs incurred by himself in the case, and shall have no claim therefor on the United States.

Title 44—Public Property and Works.

Chapter II—Federal Emergency Administration of Public Works.

Section 201.1 Appointment of Administrator. Pursuant to the authority of "An act to encourage national industrial recovery, to foster fair competition, and to provide for the construction of certain useful public works, and for other purposes", approved June 16, 1933, and in order to effectuate title II—Public Works and Construction Projects—thereof; I hereby appoint Harold L. Ickes to exercise the office of Federal Emergency Administrator of Public Works.

201.2 Delegation of functions and powers. (a) Pursuant to the authority vested in me by section 201 (a) of the National Industrial Recovery Act, approved June 16, 1933 (48 Stat. 200; 40 U. S. C. 401), I hereby delegate to the Federal Emergency Administrator of Public Works the following functions and powers:

(1) To establish such agencies, to accept and utilize such voluntary and uncompensated services, and to utilize such Federal officers and employees and, with the consent of the State, such State and local officers and employees as he may find necessary, and to prescribe their authorities, duties, responsibilities and tenure.

(2) Under the conditions prescribed in section 203 of said Act (48 Stat. 202; 40 U. S. C. 403), to construct, finance, or aid in the construction or financing of any public works project included in the program prepared pursuant to section 202 of said Act (48 Stat. 201; 40 U. S. C. 402); upon such terms as he shall prescribe, to make grants to States, municipalities, or other public bodies for the construction, repair, or improvement of any such project; to acquire by purchase, or by exercise of the power of eminent domain, any real or personal property in connection with the construction of any such project and to lease any such property with or without the privilege of purchase; and to aid in the financing of such railroad maintenance and equipment

as may be approved by the Interstate Commerce Commission as desirable for the improvement of transportation facilities.

201.4 Delegation of additional functions and powers. By virtue of and pursuant to the authority vested in me by section 201 (a) of the National Industrial Recovery Act, approved June 16, 1933, 48 Stat. 195 (hereinafter referred to as the "Act"), I hereby delegate to the Federal Emergency Administrator of Public Works the following functions and powers:

(a) In his discretion, and upon such terms and conditions as he may prescribe, to sell, assign, transfer, and deliver all securities or any part thereof purchased under the authority of section 203 of the said Act (48 Stat. 202; 40 U. S. C. 403) and of title II of the Emergency Appropriation Act, fiscal year 1935, approved June 19, 1934, 48 Stat. 1021, and to apply the proceeds as prescribed by section 203 of the said Act and said Emergency Appropriation Act, fiscal year 1935.

(b) To alter, amend, or waive any or all rules and regulations set forth in Executive Order No. 6252 of August 19, 1933, and any other rule or regulation promulgated by the President under the authority of section 209 of said Act, and to prescribe pursuant to the authority of the said section 209 any other rules or regulations as are necessary to carry out the purposes of said Act; Provided, however, no rule or regulation the violation of which is made punishable by fine or imprisonment under the said section 209 shall become effective until approved by me.

202.22 Auditors and engineer inspectors. PWA auditors examine and audit the accounts pertaining to such projects. PWA engineer inspectors observe the construction of PWA projects and make reports concerning the same.

216.2 Requirements relative to applications. All applications for financial aid must be in writing and must be prepared and submitted on forms and in accordance with instructions issued and distributed from time to time by PWA through its authorized field representatives. For further information, prospective applicants for financial aid should consult the PWA Regional Director of the region in which the prospective applicant is located.

216.3 Examination of applications. Applications for financial aid are examined, in the first instance, by the Regional Director's Office. Thereafter, the Regional Director transmits the applications to the Central Office with appropriate engineering, finance, legal and other reports and recommendations. The Central Office then conducts further examinations of the applications and the Directors of the appropriate Divisions in the Central Office as well as other designated PWA employees make any necessary additional reports and recommendations pertinent thereto. All such reports and recommendations are merely advisory to the Administrator. The foregoing is only a general outline of the existing procedure in such matters. The procedure may vary from time to time in order to comply with applicable new Congressional enactments and Executive orders, in which event detailed instructions will be issued and distributed by PWA through its authorized representatives. For further information in regard to these matters, prospective applicants should consult the Regional Director of the region in which they are located.

* * * * * * * * *

222.1 General summary of finance agreement. The finance agreement, to which the United States of America and the applicant are parties, consists of an offer on the part of the Government and the applicant's acceptance thereof. Such agreement contains the terms and conditions upon which the Government offers to make a loan and grant, a loan only or a grant only, as the case may be. It describes the project briefly and states the amount of the loan and grant, the loan only or the grant only, as the case may be. In the case

of a loan and grant or a loan only, it also sets forth the method of making the loan, the type and denomination of the security which the Government agrees to purchase, the interest rate, the place of payment, registration privileges and maturities.

* * * * * * *

222.20 Construction account. The applicant must establish a separate account or accounts (herein collectively referred to as the "Construction Account") in a bank or banks which are members of the Federal Deposit Insurance Corporation. The advance grant payment, the intermediate grant payments, the proceeds from the sale of the bonds (exclusive of accrued interest), applicant's funds, the final grant payment and any other moneys which shall be required in addition to the foregoing to pay the cost of constructing the project must be deposited in the Construction Account promptly upon the receipt thereof. All accrued interest paid by the Government at the time of delivery of any bonds must be paid into a separate account (herein referred to as the "Bond Fund"). Payments for the construction of the project must be made only from the Construction Account.

222.21 Disbursement of moneys in Construction Account. Moneys in the Construction Account must be expended only for such purposes as shall have been previously specified in a signed certificate of purposes filed with and accepted by the Government. After all costs incurred in connection with the project have been paid, if any bonds are then held by the Government, all moneys remaining in the Construction Account must be used in repurchase bonds or must be transferred to the Bond Fund.

* * * * * * *

230.1 Grant base. The grant base will be that administratively determined portion of the project costs which is used to compute the grant earned by the applicant. On a PWA non-Federal NIRA project the grant base will depend upon the cost of only the labor and the materials employed upon the project. On other PWA non-Federal

projects the grant base will depend upon the cost of the project.

230.2 Computation. The computation of the grant base will be made by auditing all costs incurred by the applicant in constructing the approved project and then selecting those items of costs which are administratively determined to be eligible for inclusion in the grant base. With certain restrictions and exceptions, the cost of equipment which is called for by the finance agreement as a permanent part of the project will be includable in the grant base.

* * * * * * *

230.21 Purpose. A grant requisition consists of a public voucher and certain supporting documents which must be prepared by the applicant for the purpose of obtaining a payment on account of the grant.

230.22 Kinds. Grant requisitions on PWA non-Federal NIRA projects are known as "advance", "partial", "intermediate", "semi-final", "final", and "supplemental final". Grant requisitions on * * * PWA non-Federal projects are known as "advance", "intermediate", "semi-final", "final", and "supplemental final".

230.23 Submission. An advance grant requisition may be submitted immediately after the PWA finance agreement has been entered into. The payment of an advance grant is entirely optional with the Administrator. Partial, intermediate and semi-final grant requisitions may be submitted at specified times during the course of construction of the project. The final grant requisition may be submitted only after the project is entirely completed and all project costs are known. Supplemental final grant requisitions are used when necessary to adjust the grant account.

230.24 Review. When the applicant has prepared a grant requisition in the required number of copies, together with the supporting documents, the applicant must deliver it to the engineer inspector assigned to the project. The engineer inspector will review it for completeness, eligibility for payment as affected by the physical condition of

the project, compliance with the PWA finance agreement and the established policies of PWA. On completion of his review the engineer inspector will submit the requisition with his recommendations to the Regional Director who will give due consideration to the recommendations of the engineer inspector and will compare the financial entries on the requisition with the project audit made by the Division of Accounts. The Regional Director will then submit the requisition with his recommendations to the Executive Officer of PWA at Washington, where it will be subjected to a final review and to a check against all of the pertinent project records.

230.25 Payment. After a grant requisition has been finally cleared and the amount of the earned grant has been administratively determined at the Washington Office of PWA, payment on account of the grant will be made to the applicant by means of a warrant on the Treasury of the United States of America.

* * * * * * * *

237.8 Construction reports. The owner must require that there shall be submitted to it by each construction contractor and must, in turn, submit to the Administrator's authorized representative or agent, schedules of the costs and quantities of materials and of other items which schedules shall be in such form and shall be supported as to correctness by such of the estimates upon which they are based as such representative or agent may require. The owner must also require that there shall be submitted to it by each such contractor and must, in turn, submit as above-stated, the following records on forms to be supplied by the Government: Detailed Estimate, and Periodical Estimates for Partial Payment.

* * * * * * * *

237.13 Payment. Not later than the 15th day of each calendar month, the owner must make partial payment to each construction contractor on the basis of a duly certified and approved estimate of the work performed during the preceding calendar month by the particular contractor, but

must retain at least 10 percent of the amount of each such estimate until final completion and acceptance of all work covered by the particular contract. The owner must require that each such contractor shall pay: for all transportation and utility services not later than the 20th day of the calendar month following that in which such services are rendered; for all materials, tools, and other expendible equipment, to the extent of 90 percent of the cost thereof, not later than the 20th day of the calendar month following that in which such materials, tools, and equipment are delivered at the site of the project, and the balance of the cost thereof not later than the 30th day following the completion of that part of the work in or on which such materials, tools, and equipment are incorporated or used; and to each of his construction subcontractors, not later than the 5th day following each payment to such contractor, the respective amounts allowed such contractor on account of the work performed by such subcontractors, to the extent of each such subcontractor's interest therein.